

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PASKUAL MARPALI,

Defendant-Appellant.

UNPUBLISHED

October 12, 2004

No. 249858

Macomb Circuit Court

LC No. 01-003200-FH

Before: Kelly, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant, Paskual Marpali, appeals of right his jury trial conviction of assault with intent to do great bodily harm less than murder, MCL 750.84. On June 20, 2002, the trial court sentenced him to twenty-four months probation, with the first sixty days served in jail and thirty-five days jail credit to be given. Because the lower court record does not indicate that defendant has been convicted of any probation violations, it could be inferred that defendant has already been discharged from probation. We affirm.

This case arises out of a fight among teenagers at a movie theater parking lot in Sterling Heights. The victim, who was seventeen at the time, sustained a hematoma on the back of his head, a broken nose that required plastic surgery, and possibly bruises to his hands and arms. Many friends of the victim, defendant, and the codefendant witnessed the fight and testified at trial. The victim drove and picked up a friend and two girls, one of whom dates defendant. They then met up with other friends before driving to the theater.

After arriving at the theater, one of the girls telephoned the codefendant and asked him to pick them up at the theater. The codefendant drove to the theater, and the girls got into the backseat of his vehicle. The girls, the codefendant, and one witness asserted that the victim then attempted to open the codefendant's door and pull him from his car. The victim alleged that the codefendant began yelling at him and insulting him in Albanian. The codefendant and the girls left the theater and met up with defendant and other friends at an arcade or game center.

The codefendant, the girls, defendant, and other friends returned to the movie theater parking lot, where they met up with the victim again. The codefendant, defendant, both girls, and the codefendant's young cousin all testified that the victim started a fight by pushing the codefendant to the ground twice. The victim and one of his friends testified that the codefendant started the fight by pushing the victim, and one witness did not see who started the fight. The

victim and the codefendant proceeded to fight, punching one another with their fists. Several witnesses looked away and did not see the entire fight. The victim claimed that defendant hit him on the back of the head with a small wooden bat, and that the codefendant punched him in the nose with his fist and the bat. All of the witnesses saw the bat, but there were inconsistencies and uncertainties about who used it. Two witnesses were unable to identify who wielded the bat, but they saw at least two people use it and asserted that the victim was struck with it. One of the witnesses who testified that the victim started the fight had previously told the police that defendant and the codefendant struck the victim with the bat. The codefendant's cousin tried to intervene by jumping on the codefendant's back, and all of the testimony is consistent that defendant hit the codefendant's cousin on the shoulder with the bat, which broke.

The codefendant, defendant, and their friends drove away. Although the victim claims that he was knocked unconscious, several witnesses recall that he was standing when they drove away. The police arrived shortly after the fight ended, and they questioned the remaining witnesses. When a police officer asked defendant who had the bat, defendant replied, "Me, I hit him with the bat." The officer understood this statement to mean that defendant hit the victim with the bat. Defendant, however, claims that he never struck the victim with the bat and maintains that he was referring to his codefendant's cousin, who had jumped on the codefendant's back.

Defendant argues that the trial court abused its discretion in denying his motion for a new trial.¹ Because defendant and his codefendant were represented by the same retained counsel, defendant contends that there was a conflict of interest and that he was denied effective assistance of counsel. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Cress*, 468 Mich 678, 691; 664 NW2d 174 (2003). An abuse of discretion occurs when the trial court's decision was so violative of fact and logic that it evidenced a perversity of will, a defiance of judgment, or an exercise of passion or bias. *Id.*

When claiming ineffective assistance due to defense counsel's conflict of interest, a defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *People v Smith*, 456 Mich 543, 556; 581 NW2d 654 (1998). Defendant asserts that the trial court did not comply with MCR 6.005(F), which governs multiple representation of defendants and provides, in pertinent part:

Whenever two or more defendants who have been jointly charged or whose cases have been joined are represented by the same retained lawyer or lawyers associated in the practice of law, the court must inquire into the potential for a conflict of interest that might jeopardize the right of each defendant to the undivided loyalty of the lawyer. The court may not permit the joint representation unless:

(1) the lawyer or lawyers state on the record the reasons for believing that joint representation in all probability will not cause a conflict of interests;

¹ A new trial may be granted pursuant to MCL 770.1 or MCL 6.431(B).

(2) the defendants state on the record after the court's inquiry and the lawyer's statement, that they desire to proceed with the same lawyer; and

(3) the court finds on the record that joint representation in all probability will not cause a conflict of interest and states its reasons for the finding.

On April 23, 2002, the parties appeared before the court ready for trial, and defense counsel made a record about his joint representation of defendant and the codefendant. Defendant and the codefendant both stated that defense counsel had advised them that separate representation would be preferred. Although defendant expressed his desire to share counsel with his codefendant, he indicated that he did not understand all of the English words used to describe a potential conflict of interest.² Defendant stated that he understood “almost everything,” and the trial court determined that this was not sufficient. The trial court adjourned the trial until April 25, 2002, when an interpreter could be present.

Before jury selection began on April 25, 2002, the trial court revisited the conflict issue with defendant and his codefendant through an interpreter. Defendant acknowledged that defense counsel discussed the conflict of interest issue with him. Defense counsel explained to defendant on the record what a conflict of interest is, and discussed loyalty. Defendant agreed that there was no conflict of interest because his defense was consistent with his codefendant's defense. Defense counsel maintained that there were no actual conflicts of interest but acknowledged the potential for a conflict if defendant or his codefendant wished to blame the other. After hearing this concern, defendant and his codefendant both stated that they wished to be tried together with defense counsel representing them. At the request of defense counsel and the assistant prosecutor, the trial court made the following findings on the record:

The Court having provided an interpreter, so that the Court could indeed determine whether or not there existed a conflict in this matter, is satisfied that the defendants have spoken with their attorney, have contemplated their defenses, have agreed with their attorney as to the defense that they will assert, have expressed their desire to be tried together and be represented by [defense counsel] in this proceeding, the Court does not believe that there is, under those circumstances, a conflict of interest.

The trial court inquired into the potential conflict, and defense counsel stated his reasons for believing that joint representation would not cause a conflict. Thereafter, defendant stated that he desired to proceed notwithstanding the court's concerns. Based on the statements of defendant and defense counsel, the trial court found that joint representation would not cause a conflict. We therefore conclude that defendant was not denied effective assistance of counsel due to defense counsel's joint representation of defendant and his codefendant. MCR 6.005(F). Defendant has likewise failed to show that an actual conflict of interest adversely affected his lawyer's performance. *Smith, supra* at 556.

² Although defendant had lived in the United States for four years at the time of trial, he is from Albania, and English is not his first language.

Next, defendant contends that the verdict is against the great weight of the evidence. A new trial based on the weight of the evidence should be granted “only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.” *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998).

The elements of assault with intent to do great bodily harm less than murder are: an assault, i.e., an attempt or offer with force and violence to do corporal hurt to another, coupled with a specific intent to do great bodily harm less than murder. *People v Bailey*, 451 Mich 657, 668-669; 549 NW2d 325 (1996), amended 453 Mich 1204; 551 NW2d 163 (1996); *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), mod 457 Mich 885; 586 NW2d 925 (1998). The victim sustained a hematoma on the back of his head, a broken nose that required plastic surgery, and possibly bruises to his hands and arms. There was overwhelming evidence that defendant used the bat, striking the codefendant’s cousin on the shoulder and breaking the bat. Two witnesses testified that at least two people struck the victim with the bat, but they were unable to identify the assailant. The victim and another witness testified that defendant struck the victim with the bat. Although the testimony differed about whether defendant was one of the people who hit the victim with the bat, absent exceptional circumstances, issues of witness credibility are for the jury. *Lemmon*, *supra* at 642. We will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Thus, we conclude that the evidence does not preponderate heavily against the verdict, and a serious miscarriage of justice will not result. *Lemmon*, *supra* at 642. Accordingly, the trial court did not abuse its discretion in denying defendant’s motion for a new trial.

Lastly, defendant argues that the trial court erred in declining to provide the jury with an instruction on the use of nondeadly force in self-defense or defense of others, CJI2d 7.22. Claims of instructional error are reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002). Jury instructions are read as a whole rather than extracted piecemeal to establish error. *Id.* at 327. Even if somewhat imperfect, jury instructions do not warrant reversal if they “fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Id.* The instructions must include all elements of the crime charged and must not exclude consideration of material issues, defenses, and theories for which there is supporting evidence. *Id.*

Defendant asserted self-defense at trial. Defendant was charged with assault with intent to commit great bodily harm less than murder, specifically that defendant hit the victim on the back of the neck with a baseball bat. There were no allegations that defendant punched or hit the victim with his fists or otherwise employed non-deadly force against the victim. Because striking someone on the neck with a baseball bat constitutes the use of deadly force, only CJI2d 7.21, self-defense where deadly force is used, was appropriate. The facts did not support CJI2d 7.22, self-defense where no deadly force is used. The instruction on self-defense where deadly force is used, CJI2d 7.21, “fairly presented the issues to be tried and sufficiently protected the defendant’s rights.” *Kurr*, *supra* at 327. Accordingly, the trial court did not err in declining to

give the non-deadly force jury instruction.

Affirmed.

/s/ Kirsten Frank Kelly

/s/ Hilda R. Gage

/s/ Brian K. Zahra